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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS
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JURISDICTIONAL STATEMENT

Appellant, Consolidated Edison Company of New York, Inc. ("Con Edison"), appeals from the final judgment of the Court of Appeals of the State of New York, entered on May 1, 1979, holding that an order of appellee, the Public Service Commission of the State of New York ("the Commission"), is not violative of appellant's right of free speech guaranteed by the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment. That order deprives all utilities subject to the Commission's jurisdiction in New York State, including appellant, of the principal means of communicating with their customers by prohibiting such utilities from using bill inserts (messages included with bills mailed to customers) to communicate their views on "controversial matters of public policy."

The asserted justification relied on by the court below for this ban is the perceived need to protect the privacy rights of utility customers. The court speculated that receipt in the mail of a message stating the utility's view on a controversial matter of public policy might "offend the sensibilities" of some of the utility's customers (Appendix A, p. 10a). It then approved the Commission's ban on the ground that "Government need not stand idly by and deny assistance to those who are inflamed by having a particular view foisted upon them." *Id.* However, under the regime of censorship approved by the court below, it is the State, rather than the individual customer, that determines what messages would offend the customer's sensibilities. Thus, in "protecting" customers from receiving materials the State assumes customers would find objectionable, the State will be preventing many customers from receiving materials even though they may wish to receive them.

Con Edison submits this jurisdictional statement to show that the Supreme Court has jurisdiction and that this appeal presents substantial questions.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 390 N.E.2d 794, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A hereto (pp. 1a-15a). The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B hereto (pp. 16a-23a). The opinion of the New York Supreme Court, Albany County, is reported at 93 Misc. 2d 313, 402 N.Y.S.2d 551 (1978), and is set forth in Appendix C hereto (pp. 24a-28a). The opinion of the Commission is reported at 17 NY PSC 1-R

(1977), and is set forth in Appendix E hereto (pp. 31a-56a). The order of the Commission on rehearing is reported at 17 NY PSC 17-R (1977), and is set forth in Appendix G hereto (pp. 59a-71a).[1]

Jurisdiction

Appellant Con Edison instituted in the courts of New York a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules and actions for declaratory judgment and injunction to annul, vacate and set aside the Commission's order, to declare the order violative of the First and Fourteenth Amendments to the United States Constitution, and to permanently enjoin its enforcement (R19-131).[2] By judgment entered on March 6, 1978 (R7-11), Special Term of the Supreme Court, Albany County, granted the relief requested (R7-11). By order dated August 2, 1978, the Appellate Division reversed that judgment and declared the Commission's order constitutional (R810-11). The Court of Appeals affirmed the order of the Appellate Division.

The Court of Appeals final judgment was entered on May 1, 1979, and is set forth in Appendix D hereto (pp. 29a-30a). A notice of appeal to this Court was timely filed with the clerk of the Supreme Court, Albany County, on

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[1] The Court of Appeals and the Appellate Division each dealt in a single opinion with the bill insert ban and with other restrictions on utility advertising imposed by the Commission. Review of these other restrictions in the courts below was obtained by Central Hudson Gas & Electric Corporation, another utility subject to the jurisdiction of the Commission. Con Edison's challenge in this Court and the courts below involves only the validity of the bill insert ban.

[2] References to the Record on Appeal in the court below are cited "R —".

June 26, 1979, and is set forth in Appendix H hereto (pp. 72a-74a). This appeal is being docketed in this Court within 90 days from entry of final judgment in the court below.

Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. §1257(2). *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (1919).

Statutes Involved

The February 25, 1977, order of the Commission, the validity of which is involved on this appeal, is not reported and is set forth in Appendix F hereto (pp. 57a-58a). In relevant part this order provides that:

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

The Court of Appeals determined that the Commission had statutory authority to regulate the content of billing envelopes (Appendix A, pp. 6a-8a). The provisions of the New York Public Service Law (§2, subds. 10, 12; §4, subd. 1; §66, subds. 1, 12-a) which were held to give the Commission statutory authority to issue the above order appear at the end of this jurisdictional statement at pp. 1s-3s.

Questions Presented

1. Whether the order of the Public Service Commission, insofar as it prohibits utilities from communicating their views to their customers on "controversial matters of public policy" by means of bill inserts, is invalid as a denial of freedom of speech.

2. Whether the words "controversial matters of public policy" as used in the Commission's order are so vague as to deprive appellant of its liberty or property without due process of law in violation of the Fourteenth Amendment.

Statement of the Case

The utility industry performs a vital role in meeting our Nation's energy requirements. It presently confronts several issues which have an important bearing on its ability to carry out this function. Examples of such issues, which are likely to have a significant impact upon utilities and consumers alike, are the use of coal for fuel for power plants to decrease dependency on expensive foreign oil imports, the replacement of investor-owned utility service by government-owned facilities, the use of nuclear power to provide the future needs for electric energy, the need for development of new sources of natural gas, the effect of environmental costs on utility rates, and other similar matters. As can be seen, all of these issues are the subjects of national public debate and it is essential to our democratic process that the free flow of information and ideas on these issues remain unfettered if the public is to be fully informed.

Appellant Con Edison provides electric, gas and steam service to more than three and a half million customers in the New York City area.[3] Bill inserts are the primary means by which Con Edison communicates its views to its customers on public issues which are important to them as consumers of utility services.[4] The uncontradicted evidence submitted by Con Edison in this case shows that it

[3] *Con Edison, Annual Report, 1978* at inside cover and 38.

[4] Con Edison also uses bill inserts to convey notices required by the Commission's regulations or by law to be sent to its customers,

lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (R112-15).

Despite the importance of bill inserts as a means of communication, on February 25, 1977, the Commission announced a policy banning the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on "controversial issues of public policy" (Appendix E, p. 43a). The Commission characterized utility customers as a captive audience and reasoned that "it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Id.* Bill inserts should be confined, the Commission concluded, to conveying "non-controversial and useful information." *Id.* The Commission implemented its ban on the use of bill inserts by the order involved on this appeal.[5]

Con Edison, several other utilities and the Consumer Protection Board petitioned for rehearing of the Commission's order (R62-104, 677-794). In its petition for rehearing Con Edison claimed that the Commission's order violated its freedom of expression secured to it by the First and Fourteenth Amendments to the United States Constitution and that the order was void for vagueness (R63-

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and to communicate information on such topics as new rates, energy conservation, customer service procedures, and safety in the use of the Company's services.

[5] Anyone who knowingly fails or neglects to obey or comply with an order of the Commission may be punished by a fine not to exceed $1,000 for each violation. Every distinct violation of any order shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense. N.Y. Pub. Serv. Law §§73, 86 (McKinney 1955).

77). By order issued July 14, 1977, the Commission rejected these constitutional claims and denied the various petitions for rehearing (Appendix G, pp. 64a-68a).

On November 7, 1977, Con Edison commenced an Article 78 proceeding and actions in Supreme Court, Albany County, to annul, vacate and set aside the Commission's order, to declare the order unconstitutional, and to permanently enjoin its enforcement (R19-131). Con Edison's Petition and Complaint included the allegation that by prohibiting Con Edison from using bill inserts to communicate its views on controversial matters to its customers, the Commission's order violated its freedom of expression under the First and Fourteenth Amendments to the United States Constitution (R27). Con Edison also alleged that the Commission's order was void for vagueness under the Fourteenth Amendment to the United States Constitution (R27-28).

Special Term of the Supreme Court held that the bill insert ban constituted a restriction on speech which was not justified by a compelling state interest. It rejected the Commission's argument that the use of bill inserts represents a subsidized means of presenting the utility's views, since it was conceded by the Commission that the cost of mailing would be the same whether or not the inserts were included with the bills, and the Commission may allocate any increased costs to the proper account (Appendix C, pp. 26a-27a). Special Term also rejected the Commission's captive audience argument, finding that the mailbox is not a constitutionally protected enclave (Appendix C, p. 27a). Special Term also found that alternate channels of communication involve more cost, are less likely to reach subscribers and may be less effective. *Id.* Finally, Special Term concluded that the Commission's order was unconstitutionally vague (Appendix C, pp. 27a-28a).

Upon the Commission's appeal, the Appellate Division, Third Department, reversed the judgment of Special Term and declared the Commission's order to be constitutional. The majority of the Appellate Division noted that the cost of mailing out bill inserts stating the utility management's views on controversial matters of public policy should not be charged to utility customers, but should be borne by the utility's shareholders. It then concluded, without any evidence or explanation, that it would be impossible for the Commission to separate out the costs attributable to mailing out bills (an expense chargeable to customers) from the costs attributable to mailing out management statements included in the billing envelopes (an expense chargeable to utility shareholders) (Appendix B, p. 18a). Ignoring the uncontradicted evidence that the Commission's ban did not leave Con Edison ample alternative channels for the communication of its views on controversial matters of public policy, the majority concluded that because the Commission's order did not ban Con Edison from using the "usual forms of advertisement," it constituted an "insignificant impingement" on Con Edison's constitutional rights, which it felt was far outweighed by the State's interest in preventing customer subsidy of "management's pamphleteering" (Appendix B, p. 19a). Finally, the majority concluded that the Commission's order was not unconstitutionally vague. *Id.* The minority of the Appellate Division found nothing to prohibit the Commission from "proportioning the costs so that the costs attributable to the placing of the bill inserts in envelopes and the mailing of bill inserts would be chargeable to shareholders rather than ratepayers" (Appendix B, p. 23a). Such an apportionment, the minority concluded, would prevent the subsidizing of management's views through the use of bill inserts. *Id.*

In affirming the order of the Appellate Division, the Court of Appeals recognized that government regulation

designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny (Appendix A, p. 8a). The Court of Appeals avoided this strict scrutiny, however, by concluding that the Commission's ban is not a content-based regulation, despite the fact that it is defined solely by reference to the content of the message. The court below then examined the Commission's order to determine if it could qualify as a valid time, place and manner regulation. It concluded that the bill insert ban was a valid time, place and manner restriction, because it viewed the order as content neutral, as supported by a significant governmental interest (the protection of the privacy rights of utility customers), and as leaving open alternative channels of expression (Appendix A, pp. 9a-11a). The court below rejected the vagueness argument properly raised by Con Edison in its notice of appeal (R805-06) and in its brief (pp. 28-30) to that court without addressing the issue in its opinion. *See Street* v. *New York,* 394 U.S. 576, 581-85 (1969); R. Stern and E. Gressman, *Supreme Court Practice* §3.27, at 214-15 (5th ed. 1978).

The Questions Presented Are Substantial

The constitutional questions presented in this case affect the several hundred public utilities regulated by the Commission in New York State, and will likely affect numerous other utilities in other states.[6] The fundamental First

[6] A bill insert ban similar to the one adopted by the New York Commission is now in effect in California, Cal. Pub. Util. Code §453(d) (West Supp. 1979). Similar bans were considered and rejected by utility regulatory commissions in Iowa and Maine as violative of the First Amendment. *Citizens United for Responsible Energy* v. *Iowa Power and Light Co.,* Docket No. C-5-185 (Iowa State Commerce Comm'n, orders dated Oct. 10 and 31, 1975); *In Re Petition of Committee for Cheaper Electrical Rates,* F. C. #2026 (Maine P.U.C. Oct. 16, 1973). Dismissal of this appeal may

Amendment rights of these corporations to freely express their views on vital issues of the day, and the fundamental First Amendment rights of their customers to hear the views which these corporations wish to express,[7] are affected by the decision below. In addition, this case raises questions about several fundamental First Amendment principles of general application.

It is to be emphasized that utility customers' rates will not be increased by reversal of the judgment of the court below. This case does not involve any questions about a utility regulatory commission's traditional ratemaking functions, or the question of who is to pay for communicative activities of utilities,[8] but involves rather the question of the constitutional validity of a state commission's attempt to impose an absolute prohibition on the communication of messages on public issues by utilities to their customers by means of bill inserts.

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result in reconsideration of these decisions. Decision in this case may also influence the outcome of a proceeding recently instituted by the North Carolina Utilities Commssion to consider "what types of inserts may be reasonably and appropriately included with utility bills." *In Re Investigation and Rulemaking Relating to What May Be Included As a Utility Bill Insert,* Docket No. M-100, Sub 80 (Nov. 10, 1978).

[7] The First Amendment protects not only the right to send, but also the right to receive, information. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976).

[8] In its opinion (Appendix E, pp. 41a-43a), the Commission reiterated its view that the cost of "political" advertising must be borne by the utility's shareholders. Con Edison has not challenged this determination.

Nor does this case involve any questions about what right the State has, if any, to regulate false or misleading messages, when the messages are at the core of the First Amendment.

POINT I

The Court Below Erred in Holding That the Commission's Ban on the Use of Bill Inserts by Utility Corporations for the Expression of Their Views on "Controversial Matters of Public Policy" Is a Valid Restriction on the Constitutionally Protected Rights of Such Corporations to Freedom of Speech and Freedom of the Press.

A. *Introduction.*

Mr. Justice Marshall captured the essence of the First Amendment when he wrote that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). It is undisputed that the speech to which the Commission's ban applies is at the core of the First Amendment. This Court recently reaffirmed the principle that discussion of public issues "is at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1978). Continuing, the Court observed that " 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " *Id.* at 776-77. It is clear that the speech in question does not lose the First Amendment's protection because its source is a corporation. *Id.* at 777.

Speech that is controversial is protected by the First Amendment. In reversing a conviction for uttering words contemptuous of the American flag, Mr. Justice Harlan wrote for the Court in *Street* v. *New York,* 394 U.S. at 592, that "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely

because the ideas are themselves offensive to some of their hearers." More recently, Mr. Justice Stevens reiterated this view in *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 745 (1978): "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." [9]

Nor is the result changed on account of the means (bill inserts) chosen by Con Edison to communicate its ideas. This Court has expressly held that "The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). And freedom of speech and the press extend not only to the content of communications, but embrace the right of distribution: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson,* 96 U.S. 727, 733 (1878). *See also Lovell* v. *Griffin,* 303 U.S. at 452.

As the court below recognized, analysis in the First Amendment area proceeds on one of two tiers, depending on the nature of the restriction which government has imposed (Appendix A, p. 8a). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is sub-

[9] *See also Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

ject to the most rigorous scrutiny. Absent some compelling justification, content-oriented restrictions may not stand. *Id.* And the burden is on the government to show the existence of a compelling state interest. As expressed by Mr. Justice Brennan in *Elrod* v. *Burns,* 427 U.S. 347 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest.

Id. at 362 (citations omitted). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 786.

There is also the principle, not recognized by the court below, that even if the government sustains the burden of proving that a restriction of freedom of expression is required to effectuate a compelling governmental interest of paramount importance, the State must employ means "closely drawn to avoid unnecessary abridgment" of protected expression. *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976).

On the second tier of First Amendment analysis are those governmental measures, such as time, place and manner regulations, which, although not directly aimed at communication, inhibit the free flow of information and ideas (Appendix A, p. 8a). To constitute a valid time, place and manner restriction, a regulation must be justified without reference to the content of the regulated speech; it must serve a significant governmental interest; and it must leave open ample alternative channels for communication of the information. *Virginia State Board of Pharmacy,* 425 U.S. at 771.

The Court of Appeals concluded that the Commission's bill insert ban was not a content-based restriction and that this ban met all requirements to constitute a valid time, place and manner regulation. Both of these conclusions are in error.

B. *The Court Below Erred in Holding That the Commission's Bill Insert Ban Is Not a Content-Based Regulation.*

Professor Ely has suggested the following question for determining whether or not a regulation is content based:

> The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to this message, or rather would arise even if the defendant's conduct had no communicative significance whatever.

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv. L. Rev. 1482, 1497 (1975) (footnote omitted). *See also* L. Tribe, *American Constitutional Law* §§12-2, 12-3 (1978).

The distinction between content-based regulations and time, place and manner regulations may be clearly seen by comparing two of this Court's decisions. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), is illustrative of content-based regulations. That case involved the validity of a Chicago ordinance prohibiting picketing within 150 feet of a school during school hours, but excepting "peaceful picketing of any school involved in a labor dispute." In writing for the Court, Mr. Justice Marshall observed that:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign.
>
> . . . .
>
> In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content."

Id. at 95-99 (footnote omitted).[10] Because the government discriminated among pickets in terms of their messages, the ordinance was held to be unconstitutional.

Kovacs v. *Cooper,* 336 U.S. 77 (1949), is illustrative of time, place and manner regulations. In that case, this Court upheld municipal regulation of sound trucks. In commenting on this decision, Professor Ely observed that "the values the state seeks to promote by such regulation, values of quiet and repose, would be threatened as much by meaningless moans and static (which is usually how it comes out anyway) as by a political message." Ely, *supra,* at 1499.

The ban approved by the court below is a classic example of a content-based restriction. The ban is determined solely by reference to the content of the message. Controversial messages are prohibited, whereas "noncontroversial and useful" messages are permitted (Appendix E, p. 43a). As in *Police Department of Chicago,* 408 U.S. at 95, "[t]he

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[10] The fact that the Commission's ban applies only to one mode of communication, a fact the court below appeared to consider important to its holding (Appendix A, p. 9a), does not transform this ban into a time, place, or manner regulation. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 94 (1977).

operative distinction is the message." Moreover, the court below could not justify the bill insert ban by reference to "an important or substantial governmental interest [that] is unrelated to the suppression of free expression," *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), as the harm on which it relied in upholding the ban flowed entirely from the communicative content of the bill inserts.[11] The bill insert ban must thus be categorized as a content-based restriction. *See* Ely, *supra,* at 1498.

The court below reached a contrary result by concluding that the bill insert ban "does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue" (Appendix A, p. 11a), and that it is applied "in an objective and evenhanded manner." *Id.* What the court is suggesting is that so long as the speech of both parties to a debate is equally suppressed, there is no violation of the First Amendment. Under this approach, the State may suppress debate on all public issues, so long as the prohibition is applied in an "evenhanded manner." The court below relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), to reach the conclusion that the Commission's ban is not content oriented (Appendix A, p. 11a). In these cases the Court approved restrictions based on subject matter, but there was no discrimination among viewpoints within subject matter. Although there are important differences between the restrictions involved in these cases and the Commission's ban,[12] the court below took no note of the differences and

[11] The court below feared that a bill insert stating a utility's position on a controversial matter might "offend the sensibilities" of the utility's customers (Appendix A, p. 10a).

[12] In *Greer* and *Lehman,* speakers attempted to obtain forced access to use the government's property for their purposes, whereas in this case the government is seeking to prevent the use by the utility of its own property for First Amendment purposes. It has been suggested that *Greer* "stands for the proposition that the government may regulate speech on its own property in ways which it could not do if the regulated speech were on private property." Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law,* 12 Gonz. L. Rev. 1, 11 (1976). Moreover, these decisions have been widely discussed by commentators as being unduly restrictive of the freedom of expression. Tribe, *supra,* §12-21, at 692-93; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chi. L. Rev. 20, at 34, 36 (1975); Schiro, *Commercial Speech: The Demise of a Chimera,* 1976 Sup. Ct. Rev. 45, 71-77; Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 270-71, 275-80; *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 1, 152-59 (1976); *The Supreme Court, 1973 Term,* 88 Harv. L. Rev. 13, 149-56 (1974); 13 Duquesne L. Rev. 1003 (1975).

disregarded other decisions in which this Court invalidated restrictions based on subject matter, *Police Department of Chicago* v. *Mosley, supra; Erzoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). To the extent that *Greer* and *Lehman* have any application to this case, it is of vital importance to the clarification of First Amendment rights that this Court utilize this appeal to reconcile these conflicting decisions on the treatment of subject-matter restrictions.[13]

[13] Professor Stone recently examined this Court's decisions involving subject-matter restrictions and concluded that:

> The Supreme Court has failed to recognize subject-matter restrictions as a separate class of restraints on speech. As a consequence, the Court has in some cases treated the subject-matter restriction as if it were indistinguishable from other sorts of content-based restrictions, while in others it has effectively disregarded the subject-matter restriction entirely and thus analyzed the challenged legislation or regulation as if it were content-neutral. Moreover, apart from a few rather obvious and seemingly casual observations, the Court has made little effort to place the problem in its proper first amendment context or to analyze it in any real depth.
>
> Although the differences between content-based and content-neutral restrictions are more elusive than might be expected, and are often only differences of degree, such differences do exist, and the Court's exacting scrutiny of content-based restrictions can be explained and justified. Subject-matter re-

There remains the question whether the court below properly concluded that the Commission's ban is viewpoint neutral (Appendix A, p. 11a), for it is undisputed that if the Commission discriminates among speakers on the basis of their viewpoints within a subject matter, its ban would be unconstitutional: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 784-85 (citing *Police Department of Chicago* v. *Mosley,* 408 U.S. at 96). *See also Greer* v. *Spock,* 424 U.S. at 838-39; *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 (1976).

Contrary to the Court of Appeals' conclusion, the Commission's ban does prohibit the expression of one position on hotly debated issues. By its terms the Commission's order provides that the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" is prohibited (Appendix F, p. 58a; *see also* Appendix E, p. 43a) (emphasis added). Nor is the restriction applied by the state in an evenhanded manner, since the ban applies only to utilities and to no one else (Appendix F, p. 58a).

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strictions pose a particularly intriguing and useful puzzle, for they seem to exist in a middle world, sharing some characteristics with both of the more common forms of restrictions. It is largely for this reason that the Court has had so much difficulty in its efforts to come to grips with the subject-matter puzzle.

Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. Chi. L. Rev. 81, 115 (1978).

C. *The Court Below Erred in Holding That the Commission's Ban Is a Valid Time, Place and Manner Regulation.*

Having determined that the Commission's ban is not a content-based regulation, the court below concluded that the ban furthers a significant governmental interest and does not foreclose alternative channels of expression, and thus constitutes a valid time, place and manner restriction (Appendix A, pp. 9a-11a). Even assuming the correctness of the Court of Appeals' conclusion that the Commission's ban is not a content-based regulation, its holding that this ban meets these other criteria to constitute a valid time, place and manner regulation is in error.

1. The Commission's Ban Does Not Further a Significant Governmental Interest.

a. *The Commission's Ban Does Not Accomplish Its Purpose.*

As we shall discuss below, this case raises the question whether the State has a valid interest, superior to the utility's freedom of expression guaranteed by the First Amendment, in protecting utility customers from receiving materials in the mail expressing a viewpoint with which they may disagree. Even assuming the presence of such a state interest, the bill insert ban approved by the Court of Appeals does not further that interest, and must be invalidated on this ground alone. *Smith* v. *Daily Mail Publishing Co.,* 47 U.S.L.W. 4824, 4826 (June 26, 1979).[14]

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[14] *Smith* involved the validity of a West Virginia statute which made it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender. The statute did not restrict the electronic media or any form of publication, except newspapers, from printing the names of youths charged in juvenile proceedings. The sole interest advanced by the State to justify this criminal statute

Furthermore, in the area of the First Amendment, "government may regulate . . . only with narrow specificity," *NAACP* v. *Button,* 371 U.S. 415, 433 (1963), and must act in a way so as to avoid unnecessary abridgement, *Buckley* v. *Valeo,* 424 U.S. at 25. The Commission's ban is both underinclusive and overinclusive. *See In Re Primus,* 436 U.S. 412, 432-33 (1978); *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 792-95; *Erzoznik* v. *City of Jacksonville,* 422 U.S. at 213-15.

First, the restriction applies only to utilities. The State has not acted to "protect" utility customers from receiving "offensive" materials[15] of the nature here involved from any other source. There is no evidence in this record that would support the conclusion that people are more offended by receipt of unwanted mail from utilities than from other sources.[16]

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was to protect the anonymity of juvenile offenders. This Court invalidated the statute because even assuming that the statute served a state interest of the highest order, it did not accomplish its stated purpose. *Id.* at 4826. As Mr. Justice Rehnquist explained: "It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment." *Id.* at 4827 (concurring opinion).

[15] The Court of Appeals merely *assumed* that customers would find the utility's views on public issues to be offensive (Appendix A, p. 10a). There is no basis for this assumption in the record except a complaint by a handful of Con Edison's more than three and a half million customers (R139-50).

[16] While utilities may have a monopoly in providing utility service, they have no monopoly in communicating by mail. The Privacy Protection Study Commission found that each week the U.S. Postal Service delivers 2.3 pieces of unsolicited direct mail to the average American household. *See Personal Privacy in an Information Society* 125 (1977) (hereinafter cited as *Privacy Commission Report*). Most, if not all, utility customers may easily be reached by mail by others. Most telephone utility customers'

Second, even utilities may mail "offensive" materials to their customers so long as the "offensive" message is not included in the billing envelope (Appendix A, pp. 9a-10a). Here again, there is no evidence in this record that would support the conclusion that utility customers are more offended by receipt of a message from their utility in the billing envelope than by receipt of the same message in a separate envelope.[17]

Third, the ban applies only to messages stating the "utility's position on controversial matters of public policy" (Appendix F, p. 58a). Once again, there is no evidence in this record that would support the conclusion that utility customers are more offended by messages on public issues than by other messages.[18] Many customers would undoubtedly prefer to receive information about the operation of nuclear power plants or the effect on their rates of the installation of multi-million dollar cooling towers at electric generating plants, than tips about the use of hair dryers. The State's interest in protecting utility customers from exposure to offensive materials is not advanced when it is the State, rather than the individual customer,

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addresses can be obtained simply by using the telephone directory. The addresses of most customers of other types of utilities can be obtained from telephone directories or from one or more of the many readily available mailing lists. It has been estimated that there are 25,000 mailing lists in existence, Ballard, *Privacy and Direct Mail Advertising,* 47 Fordham L. Rev. 495, 497 (1979). Some mailing lists contain as many as 60 million American households, *Privacy Commission Report, supra,* at 128.

[17] The only certain conclusion one can reach about these two kinds of mailings is that the latter is significantly more expensive (R112-13).

[18] For many customers, the contrary is true: "In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers." *Lehman* v. *City of Shaker Heights,* 418 U.S. at 319 (Brennan, J., dissenting opinion) (footnote omitted).

that determines what messages would offend the customer's sensibilities.[19] Moreover, the approach followed by the Court of Appeals is in fundamental conflict with this Court's holdings that the State may not make the decision for its citizens as to what materials to read. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), makes clear that the decision as to whether a given communication is to be received is a judgment for each person to make, not one for the State to impose upon the entire community. In *Rowan,* the Court upheld a statute, 39 U.S.C. §4009, 39 U.S.C.A. app. §4009 (West Supp. 1979) (current version at 39 U.S.C.A. §3008 (West Supp. 1979)), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications in *Rowan* were not prevented from doing so. Equally important, the determination of offensiveness under the statute involved in *Rowan* was completely within the discretion of the individual householder; no governmental evaluation of the mail's content stood between the mailer and the householder. *See FCC* v. *Pacifica Foundation,* 438 U.S. at 766 (Brennan, J., dissenting opinion). This Court's distaste for governmental intrusion into the channels of communication is reflected in many of its decisions. In *Cohen* v. *California,* 403 U.S. 15, 25 (1971), Mr. Justice Harlan wrote that "[i]ndeed, we think it is largely because governmental officials cannot make principled distinctions in

[19] When the State imposes an absolute ban on mailing certain messages to all of a utility's customers by means of bill inserts, the ban, of necessity, is overly broad, because it impedes delivery of the message even to willing addressees. However, "[i]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring opinion). *See also United States* v. *O'Brien,* 391 U.S. at 377.

this area [between offensive and non-offensive words] that the Constitution leaves matters of taste and style so largely to the individual." In *Martin* v. *Struthers,* 319 U.S. 141 (1943), the Court invalidated an ordinance banning door-to-door distribution of literature to protect the privacy of householders, because the ordinance substituted the judgment of the community for the judgment of the individual householder. The Court noted that the ordinance subjected the distributor to punishment for annoying the person on whom he calls, "even though the recipient of the literature distributed is in fact glad to receive it." *Id.* at 144.

b. *The State's Interest in Protecting the Privacy of the Home From Unwanted Communications Is Not Sufficient to Justify the Prohibition on the Mailing of Messages at the Core of the First Amendment.*

Should this Court conclude that the Commission's ban accomplishes its purpose, this case would present a conflict between the First Amendment rights of entities to disseminate their views by means of bill inserts sent through the mail and the privacy rights at home of unwilling recipients, when the messages to be sent are at the core of the First Amendment. This Court has never considered this question.[20] It is an important and recurring question which we believe warrants plenary consideration by this Court.

[20] *Rowan* v. *United States Post Office Department* is the closest in its facts to this case. However, that case involved a statute (39 U.S.C. §4009) dealing with the mailing of any "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Commentators have suggested that *Rowan* is no authority for restricting the mailing of noncommercial, core First Amendment materials, the kinds of materials involved in this case. *The Supreme Court, 1969 Term,* 84 Harv. L. Rev. 1, 125 (1970); 22 Baylor L. Rev. 442, 449 (1970).

The Court of Appeals erred grievously in concluding that several of this Court's decisions support the result it reached in this case (Appendix A, p. 10a). The court below misconstrued all of these decisions, for none of them supports its conclusion. *Rowan* and *Martin* v. *Struthers* make clear that the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose, as the Commission did here, upon the entire community. *Kovacs* v. *Cooper* involved an ordinance prohibiting the operation of sound trucks emitting "loud and raucous noises" on the street, and unlike this case, there was no attempt to regulate the content of the communications. *Cohen* v. *California* involved a conflict between the First Amendment rights of speakers and the privacy rights of unwilling viewers outside the home. In holding that the First Amendment rights of speakers prevailed in that context, the Court wrote that:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 21. Finally, the Court of Appeals relied on *Lehman* v. *City of Shaker Heights,* the "captive audience" case, in approving the Commission's bill insert ban. The "captive audience" doctrine means that one may not hold an unwilling viewer or listener captive and coerce him or her to read or listen to the speaker's message. Mr. Justice Douglas, who first gave this doctrine judicial recognition, noted that coercion is a necessary element of the doctrine:

> The present case involves a form of coercion to make people listen. . . . [T]he man on the streetcar has no choice but to sit and listen [to radio programs], or perhaps to sit and to try *not* to listen.

Public Utilities Commission v. *Pollak,* 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting opinion). *See also* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 53 Colum. L. Rev. 960 (1953). There is no captive audience in this case. There is no coercion to read unwanted mail, as the recipient is free to discard the utility's message, unread, the minute he receives it.

The recognition by the court below of an absolute right of privacy superior to the First Amendment is in conflict with the approach taken by this Court of balancing the right of privacy against other values. *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977); *Carey* v. *Population Services International,* 431 U.S. 678 (1977); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). *See also* Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 926-27 (1963); Stone, *supra* note 12, at 256-72. Under a balancing approach, the court below should have weighed the importance of bill inserts as a means of expression against the extent of intrusion into the privacy of the home caused by this means of communication.

The importance of bill inserts as a means of communication to appellant cannot be disputed. Bill inserts are effective in reaching their intended audience; they are inexpensive (they can be mailed out without incurring any postage costs in addition to what must otherwise be incurred in mailing out bills); and they are most suitable for lengthy

messages on complicated subjects (they need not compete for attention with other messages as in newspapers).[21]

On the other side of the scale, bill inserts are possibly the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door communication which this Court approved in *Martin* v. *Struthers,* or communication by telephone. The homeowner may pick up the mail at his convenience and may dispose of unwanted messages at will. If the standard here is to be the one adopted by the Court in *Cohen,* then it can hardly be argued that "substantial privacy interests are being invaded in an essentially intolerable manner" when the unwilling recipient can avoid all but momentary offense by merely throwing the material away. The proper solution here, as in *Cohen* v. *California,* 403 U.S. at 21, is for the recipients to "avoid further bombardment of their sensibilities simply by averting their eyes."

The trivial burden of disposing of unwanted mail is hardly sufficient to justify the far-reaching infringement of First Amendment rights approved by the court below. Professor Haiman concluded that "the act of throwing away unwanted mail strikes this writer as such a simple operation that it is difficult to understand the necessity for any further restrictions." *Speech* v. *Privacy: Is There A Right Not To Be Spoken To?,* 67 Nw. U.L. Rev. 153, 180 (1972). Most commentators are in agreement with this view. The Privacy Protection Study Commission quoted with approval the testimony of the U.S. Postal Service expressing the view that " 'the recipient of the unwanted mail matter has the

[21] Also to be considered in the balance is the nature of the means of communication. " '[T]he use of the mails is almost as much a part of free speech as the right to use our tongues. . . .' " *Lamont* v. *Postmaster General,* 381 U.S. at 305 (quoting *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 437 (1921) (Holmes, J., dissenting opinion)) (footnote omitted).

option of throwing it away. Indeed, an individual probably finds it easier to avoid reading his mail than to escape from any other form of advertising.' " *Privacy Commission Report, supra* note 16, at 149 (quoting *Mailing Lists, Hearings Before the Privacy Protection Study Commission,* 253-54 (Dec. 11, 1975)). David Ballard expressed a similar view recently when he wrote that "[u]nder *Cohen,* given the indispensability of direct mail advertising to the communication of various types of expression, it is questionable whether, at least when obscenity is not involved, direct mail advertising can be viewed as such an intolerable invasion of privacy so as to be prohibited." Ballard, *supra* note 16, at 521. Similarly, Professor Schwartz observed that "the First Amendment right to communicate, given today's emphasis on the value of free expression, seems to outweigh the interests of the homeowner in privacy," *The Mail Must Not Go Through—Propaganda and Pornography,* 11 U.C.L.A. L. Rev. 805, 858 (1964). Finally, a commentator observed that "[t]he measure of an individual's privacy should consist not in his total protection from stimuli, but rather in his ability to avoid further contact with stimuli which the individual has tasted and found unpalatable. The government thus has an interest in protecting its citizenry from those who wish to compel continued contact with ideas already rejected, but not in providing a protective cocoon against initial exposure." 48 Wash. L. Rev. 667, 682 (1973) (footnote omitted).

2. The Commission's Bill Insert Ban Does Not Leave Open Ample Alternative Channels for Communication of the Utility's Positions on Controversial Matters of Public Policy.

This branch of the case raises two important questions for the Court's consideration. First, does the state, or the party whose free speech rights are being infringed, have

the burden of proof on the issue of the availability of ample alternative means of communication? The Court of Appeals ruled that the party whose free speech rights are being infringed has this burden (Appendix A, p. 10a). This Court has apparently never decided this question. However, it has indicated that government restrictions of speech and the press are "'presumptively unconstitutional,'" *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 558 (1976) (quoting *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting opinion)), and that the burden is on the government to justify the restriction, *Elrod* v. *Burns,* 427 U.S. at 362. Consistent with these views, the government should have the duty to ascertain, prior to instituting time, place, and manner restrictions, that those whose freedom of speech is being infringed have ample alternative channels for the expression of their views.

Second, regardless of which party has the burden of proof on this issue, was the Court of Appeals correct in concluding that the Commission's bill insert ban leaves open ample alternative channels for the communication of the utility's messages (Appendix A, pp. 9a-10a)? In a superficial analysis of this issue, the Court of Appeals reasoned that since the Commission's ban applies only to bill inserts, all other means of communication that were previously available remain available. *Id.* The court made no attempt to evaluate whether these other means of communication are more expensive, and whether they are effective means for communicating the utility's message. The Court of Appeals simply ignored the controlling decision of this Court under which these factors must be considered. In concluding that alternatives to the use of "For Sale" signs for selling real estate "are far from satisfactory" in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431

U.S. at 93, this Court examined the relative cost of alternatives (they "involve more cost and less autonomy than 'For Sale' signs"), their likelihood of reaching the intended audience (they "are less likely to reach persons not deliberately seeking sales information"), and their effectiveness (they "may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold").[22]

The uncontradicted evidence presented by Con Edison in this case, which the Court of Appeals totally ignored, is that other means of communication involve more cost, are less likely to reach customers, and may be less effective (R112-15). As shown by this evidence, a separate mailing would be prohibitively expensive, each mailing costing at least an additional $210,000 in postage alone. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts. This Court has not hesitated to review the records in First Amendment cases to assure that constitutional principles are properly applied. *In Re Primus,* 436 U.S. at 434. *See also* L. Tribe, *supra,* §12-8, at 603. We request this Court to review the record in this case so that a gross misapplication of First Amendment principles may be corrected.

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[22] Alternative means of communication were available in *Linmark,* but the problem in that case, as in this case, was that they were more costly and less effective. In *Linmark* the record showed that only thirty per cent of the inquiries to plaintiff's real estate office were a result of "For Sale" signs being posted on residences. *Linmark Associates, Inc.* v. *Township of Willingboro,* 535 F.2d 786, 792 n.5 (3d Cir. 1976), *rev'd,* 431 U.S. 85 (1977). Thus, seventy percent of the inquiries to plaintiff's real estate office were a result of other means of advertising. Yet, this Court concluded that the ban on the use of "For Sale" signs did not leave plaintiff ample alternative channels for communication.

POINT II

The Court Below Erred in Rejecting Con Edison's Claim That the Commission's Bill Insert Ban Is Unconstitutionally Vague.

It is a basic principle of due process under the Fourteenth Amendment to the United States Constitution that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 785 n. 21; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Buckley* v. *Valeo,* 424 U.S. at 40-41; *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). Moreover, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147, 151 (1959).

The vice of vagueness in the First Amendment area is threefold: (1) it may trap the innocent by failing to provide fair warning; (2) it does not provide explicit standards for those who apply them, thus fostering arbitrary and discriminatory enforcement; and (3) it operates to inhibit the exercise of First Amendment freedoms. *Grayned* v. *City of Rockford,* 408 U.S. at 108-09.

The Commission's ban on the use of bill inserts which express the utilities' positions on "controversial matters of public policy" is so vague that Con Edison can only guess at its meaning. The Commission has provided absolutely no standards for determining what are "controversial matters of public policy." Special Term properly concluded that the Commission did not adequately define the messages to which its ban applies (Appendix C, pp. 27a-28a).

The Commission's order is also illustrative of the second vice of vagueness: the failure to provide adequate standards for those applying the regulation, resulting in arbitrary and discriminatory enforcement, *Grayned* v. *City of Rockford,* 408 U.S. at 108-09. It is no answer to a claim of vagueness to say, as the Appellate Division did, that "[w]e have little doubt" that the regulators and the regulated will be able to determine the subjects to which the prohibition applies (Appendix B, p. 19a). This is precisely the result which the vagueness doctrine is designed to prevent. Under that doctrine, unrestricted discretion may not be vested in a state official with respect to regulating activities protected by the First Amendment. As this Court stated in *Kunz* v. *New York,* 340 U.S. 290, 295 (1951):

> It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his actions.

See also Cantwell v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *Griffin,* 303 U.S. 444.

There are no standards to guide the Commission's actions. Its future pronouncements, if any, as to which matters are controversial and which are not will amount to nothing more than arbitrary and subjective applications of a vague standard (*see, e.g.,* Appendix E, pp. 43a, 44a; Appendix G, pp. 66a-67a).

CONCLUSION

This appeal raises several important First Amendment issues which warrant plenary review. First, are restrictions on speech which discriminate among speakers in terms of subject matter consistent with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"? *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Is the government's obligation of neutrality toward speakers violated when it imposes a restriction on speech applicable to parties on one side of a public issue?

Second, is the bill insert ban approved by the court below a valid time, place and manner regulation? If it is determined that the Commission's ban advances the State's asserted interest, this case presents a conflict between the right of privacy of the home and the right to communicate. Does the superficial analysis of the court below comport with this Court's requirements for determining whether the State's restriction on speech leaves the regulated party ample alternative channels for communicating its views? Who shall bear the burden of proof on this issue?

Finally, did the court below review the regulation at issue with proper sensitivity to First Amendment values to insure that it will not have an inhibiting effect on speech because of its vagueness?

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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July 27, 1979

OTHER STATUTORY PROVISIONS INVOLVED

Other Statutory Provisions Involved

The New York Public Service Law (McKinney 1955 and Supp. 1978-1979) provides in relevant part:

§ 2. Definitions

* * *

10. The term "gas plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.

* * *

12. The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

* * *

§ 4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry

out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

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§ 66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

* * *

12-a. Have power to fix and alter the format and informational requirements of bills utilized by public

and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts. The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy.